Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-469

O. L. GRAGG, *Appellant*,

v.

CAYUGA INDEPENDENT SCHOOL DISTRICT, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF TEXAS

Appellee's Motion to Dismiss or Affirm

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-469

O. L. GRAGG, *Appellant*,

v.

CAYUGA INDEPENDENT SCHOOL DISTRICT, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF TEXAS

Appellee's Motion to Dismiss or Affirm

Now comes Cayuga Independent School District, Appellee in the above numbered and entitled cause, and files this motion to dismiss Appellant's appeal or to affirm the judgment of the Supreme Court of Texas pursuant to and under the authority of U.S. Sup.Ct. Rule 16, 28 U.S.C.A. and in support thereof Appellee respectfully shows the Court the following:

THE OPINIONS BELOW

The written Opinion rendered by the Supreme Court of Texas is reported at 539 S.W.2d 861. The Majority Opinion of the Supreme Court of Texas is reproduced as Appendix C of Appellant's Jurisdictional Statement and for that reason is not reproduced herein, but Appellant's Jurisdictional Statement failed to include in such Appendix C the Concurring Opin-

ion rendered in the Supreme Court of Texas. A copy of such opinion appears herein as Appendix A.

STATEMENT OF THE GROUNDS UPON WHICH THIS APPEAL SHOULD BE DISMISSED OR THE JUDGMENT OF THE SUPREME COURT OF TEXAS AFFIRMED

(1) The precise question presented by Appellant in his Jurisdictional Statement has previously been brought before this Honorable Supreme Court of the United States, and the Court has decided the question adversely to the position taken by the Appellant herein.

(2) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that the federal question sought to be reviewed was not expressly passed on by the Supreme Court of Texas.

(3) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that such appeal does not present a substantial federal question.

(4) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that the judgment of the Supreme Court of Texas rests upon an adequate non-federal basis, in that it is based upon the holding that Appellant failed to discharge his burden of proof so as to qualify himself

and his lands for ad valorem tax assessments under TEX. CONST. art. VIII, sec. 1-d.

(5) Appellant would not be entitled to any relief from the judgment of the Supreme Court of Texas even if TEX. CONST. art. VIII, sec. 1-d, as applied by the Supreme Court of Texas, were held by this Supreme Court of the United States to violate the Fourteenth Amendment to the Constitution of the United States, for the reason that such a decision would require a holding invalidating Art. VIII, sec. 1-d entirely, thereby removing any Constitutional basis upon which Appellant could assert a claim for ad valorem tax assessments based upon the agricultural use value of his lands.

ARGUMENT IN SUPPORT OF GROUNDS UPON WHICH THIS APPEAL SHOULD BE DISMISSED OR THE JUDGMENT OF THE SUPREME COURT OF TEXAS AFFIRMED

(1) The precise question presented by Appellant in his Jurisdictional Statement has previously been brought before this Honorable Supreme Court of the United States, and the Court has decided the question adversely to the position taken by the Appellant herein.

Appellant attempts to present to this Court the question

> ". . . may the definition of agricultural land, and the determination of whether or not the owner thereof is a bona fide agriculturalist, be made dependent upon the amount of non-agri-

> cultural income possessor of said land enjoys . . . without being violative or repugnant to the Fourteenth Amendment to the Constitution of the United States." Jurisdictional Statement, p. 4.

This is not an accurate statement of the issue involved in this case. Rather, it could be fairly stated that Appellant's position is that the provision of TEX. CONST. art. VIII, sec. 1-d (a) requiring the agricultural business to be . . ."the primary occupation and source of income of the owner" (of the land) in order to entitle the owner of the lands to preferential ad valorem tax assessments is a violation of the Fourteenth Amendment of the Constitution of the United States.

This precise question has previously been presented to the Supreme Court of the United States. The case of *Stein v. Lewisville Independent School District*, 481 S.W. 2d 436 (Tex.Civ.App.-Fort Worth 1972, writ ref'd n.r.e.) was brought to the Supreme Court on appeal from the Court of Civil Appeals of Texas, Second Supreme Judicial District (Supreme Court of the United States Docket No. 72-1558). Among the questions presented to this Court was a question of whether the requirements of Art. VIII, sec. 1-d necessary to obtain ad valorem tax assessments based upon the agricultural use value of land violated the taxpayer's rights under the Fourteenth Amendment to the Constitution of the United States. The Supreme Court dismissed the appeal for want of jurisdiction, and treating the appeal as a petition for writ of certiorari, denied certiorari. 414 US 948, 38 L.Ed. 2d 203 (1973).

The dismissal of the *Stein* appeal amounts to a

holding on the merits that TEX. CONST. art. VIII, sec. 1-d does not possess the federal constitutional infirmity asserted then by Mrs. Stein and now being asserted by Appellant. *Port Authority Bondholders Protective Committee v. Port of New York Authority*, 270 F.Supp. 947 (D.C.N.Y. 1967), aff'd. 387 F.2d 259; *Wyley v. Warden, Maryland Penitentiary*, 254 F.Supp. 727 (D.C.Md. 1966), aff'd. 372 F.2d 742, cert. denied 389 U.S. 863, 19 L. Ed. 2d 131.

Because the Court has already determined the precise question sought to be reviewed in this appeal, and determined the question adversely to Appellant's position, this appeal should be dismissed for want of jurisdiction or, alternatively, the judgment of the Supreme Court of Texas should be affirmed.

(2) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that the federal question sought to be reviewed was not expressly passed on by the Supreme Court of Texas.

(3) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that such appeal does not present a substantial federal question.

In none of the Texas courts was there a question as to the validity of Art. VIII, sec. 1-d of the Texas Constitution on the ground that it is repugnant to the Fourteenth Amendment to the Constitution of the

United States, and consequently, there is no holding in the opinion of the Supreme Court of Texas upholding the validity of Art. VIII, sec. 1-d. On the contrary, Appellant based his entire defense to Appellee's suit for the collection of delinquent taxes on the contention that he was entitled to ad valorem tax assessments based upon the agricultural use value of his lands, as provided by Art. VIII, sec. 1-d, a defense which in no way can be consistent with the claim that the Article violates the Fourteenth Amendment to the Constitution of the United States. He did not attack the validity of the constitutional provision; he instead *relied* upon the provision in his claim for relief against the ad valorem tax assessments being asserted against him.

Rather than being a case involving the validity of the State's constitutional enactment this is a case involving the construction of the constitutional enactment. The opinion of the Supreme Court of Texas, which covers some fourteen pages in the official report restricts itself to a construction of the clause "primary occupation and source of income of the owner" and the effects of such construction on the particular facts of the case. In at least three instances the Supreme Court of Texas expressly approved Appellant's contentions as to the proper construction of the phrase "primary occupation and source of income."

> "We agree with Petitioner Gragg's contention that the "primary occupation and source of income" provision contemplates "gross" rather than "net" income." 539 S.W. 2d, p. 865

> ". . . we agree with Petitioner Gragg that the word "primary" should not be interpreted as requiring the farmer or rancher to receive more than fifty percent of his total gross income from his farming or ranching business." 539 S.W. 2d, p. 868
>
> "Petitioner Gragg contends that only sources of gross income from occupations or business ventures carried on for profit should be compared with gross income from agricultural sources in determining eligibility for the agricultural use designation. This seems to be the clear intent of the agricultural assessment amendment." 539 S.W. 2d, p. 869.

It is apparent that Appellant was not interested in attacking the validity of Art. VIII, sec. 1-d, for he relies upon the article and seeks the ad valorem tax benefits conferred by the article; instead, the thrust of his position in the case has been to obtain a construction of the constitutional enactment most favorable to his position. It is a clearly established principle of law that a case involving the construction of a State enactment does not present a federal question to bring the case within the statutory jurisdiction of the Supreme Court of the United States under 28 U.S.C.A. Sec. 1257 (2). *Grand Gulf R. Co. v. Marshall*, 53 U.S. 165, 13 L.Ed. 938 (1851); *U.S. v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 28 L. Ed. 2d 822 (1971).

> "This court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state." *Quong Ham Wah Co. v. Industrial*

Accident Commission, 255 U.S. 445, p. 448, 65 L. Ed 723 (1921), citing other cases.

This being a case involving nothing more than the construction of a provision of the Texas Constitution, this appeal to the Supreme Court of the United States should be dismissed for want of jurisdiction.

(4) The Supreme Court of the United States does not have jurisdiction of this appeal under 28 U.S.C.A. Sec. 1257 (2), as asserted by Appellant, for the reason that the judgment of the Supreme Court of Texas rests upon an adequate non-federal basis, in that it is based upon the holding that appellant failed to discharge his burden of proof so as to qualify himself and his lands for ad valorem tax assessments under TEX. CONST. Art. VIII, Sec. 1-d.

A cursory reading of the opinion of the Supreme Court of Texas is all that is necessary to ascertain the basis for the decision in this case. The Supreme Court of Texas *did not* affirm the judgments of the District Court and the Court of Civil Appeals by holding the Texas Constitutional provision to be valid as against any contention by Appellant that the provision violated the Fourteenth Amendment to the Constitution of the United States. The decision was not even based upon the construction given Art. VIII, sec. 1-d by the Supreme Court of Texas. The grounds for the decision was very simply a holding that Appellant failed to discharge his burden of proof so as to entitle him to ad valorem tax assessments based upon the agricultural use value of his land. The holding upon

which the decision of the Supreme Court of Texas was based is found in the final two paragraphs of the majority opinion at 539 S.W. 2d, p. 870:

> "Even if the tax assessor had been given all the evidence on this taxpayer's income that was introduced at the trial, the denial of the agricultural use designation would have been justified. . . . he (the taxpayer) admitted that his income reported from his oil operations was "net" rather than the "gross," which he contended for and reported in connection with his agricultural income. There was simply no proof of his gross income from the oil business. Neither was there any proof that the gross receipts from his oil operations or another business venture did not exceed the gross receipts from his agricultural business.
>
> "The record fails to show that the denial of the agricultural use exemption to this taxpayer by the tax assessor was unreasonable, arbitrary or in violation of requirements of the law. The burden fell upon the taxpayer to make that showing, and the trial court and the Court of Civil Appeals have correctly held that the taxpayer failed to do so. See *State v. Whittenburg*, 153 Tex. 205, 265 S.W. 2d 569 (1954); *State v. Houser*, 138 Tex. 28, 156 S.W. 2d 968 (1941)."

From its very inception the Supreme Court of the United States has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53 L.Ed. 81 (1908); *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 61 L.Ed. 644 (1917); *Fox Film Corp.*

v. Muller, 296 U.S. 207, 80 L.Ed. 158 (1935). Mr. Justice Jackson stated the rule and the reason for the rule excellently in *Herb v. Pitcairn*, 324 U.S. 117, 89 L.Ed. 789 (1945):

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." 324 U.S. 117, pp. 125, 126.

That this case was decided on adequate and independent state grounds cannot be disputed. It was not a State constitutional provision repugnant to the Fourteenth Amendment to the Constitution of the United States which prevented Appellant from obtaining ad valorem tax assessments based upon the agricultural use value of his land, nor was Appellant denied such assessments because the Supreme Court of Texas applied TEX. CONST. art. VIII, sec. 1-d in a manner so as to deny him rights guaranteed by the Fourteenth Amendment. The decision of the Supreme

Court of Texas denying him such assessments was solely caused by Appellant's failure to discharge the burden of proof imposed upon him by State law.

It has long been established under Texas law that a taxpayer asserting an exemption from taxation (or a preferential assessment, such as that conferred by Art. VIII, sec. 1-d of the Texas Constitution) bears the burden of proving all facts necessary to entitle him to such exemption. *Markham Hospital v. City of Longview*, 191 S.W.2d 695 (Tex. Civ. App.-Texarkana 1946, writ ref'd); *David Graham Hall Foundation v. Highland Park Independent School District*, 371 S.W. 2d 762 (Tex.Civ.App.-Dallas 1963, writ ref'd n.r.e.); *Methodist Riveroaks Apartments, Inc. v. City of Waco*, 409 S.W.2d 485 (Tex.Civ.App.-Waco 1963, writ ref'd n.r.e., cert denied 389 U.S. 848); *Radio Bible Hour, Inc. v. Hurst-Euless Independent School District*, 341 S.W.2d 467 (Tex.Civ.App.-Fort Worth 1961, writ ref'd n.r.e.); *Hilltop Village, Inc. v. Kerrville Independent School District*, 410 S.W.2d 824 (Tex.Civ.App.-San Antonio 1966, aff'd 426 S.W.2d 943 (Tex.Sup. 1968); *Stein v. Lewisville Independent School District*, supra.

The case of *Stein v. Lewisville Independent School District* was appealed to the Supreme Court of the United States from a decision of the Court of Civil Appeals for the Second Judicial District of Texas denying an agricultural use assessment to the taxpayer. The grounds for the Court of Civil Appeals holding was the same as the grounds for the decision of the Supreme Court of Texas in this case; the tax-

payer failed to discharge her burden of proving her entitlement to such assessment, a matter of State law. As previously stated the Supreme Court of the United States dismissed the appeal and denied writ of certiorari in the *Stein* case. Because the decision of the Supreme Court of Texas in the instant case is based upon the identical grounds as the decision of the Fort Worth Court of Civil Appeals in the *Stein* case Appellant's appeal should be dismissed for want of jurisdiction, or, alternatively, the judgment of the Supreme Court of Texas should be affirmed.

(5) Appellant would not be entitled to any relief from the judgment of the Supreme Court of Texas even if TEX. CONST. Art. VIII, Sec. 1-d, as applied by the Supreme Court of Texas, were held by this Supreme Court of the United States to violate the Fourteenth Amendment to the Constitution of the United States, for the reason that such a decision would require a holding invalidating Art. VIII, Sec. 1-d entirely, thereby removing any constitutional basis upon which Appellant could assert a claim for ad valorem tax assessments based upon the agricultural use value of his lands.

Appellant complains of the action of the Supreme Court of Texas in giving effect to the provision of TEX. CONST. art. VIII, sec. 1-d requiring the agricultural business to be the "primary occupation and source of income of the owner" in order to be entitled to ad valorem tax assessments based upon the agricultural use value of the lands, asserting that such provision violates the Fourteenth Amendment

to the Constitution of the United States. But even if Appellant were correct in his assertion, the practical result of the case would be the same. He would not be entitled to ad valorem tax assessments based on the agricultural use value of his lands. Moreover, his success on this point would destroy his claim for agricultural use value assessments in the future.

TEX. CONST. art. VIII, sec. 1-d was passed by the Texas Legislature in 1965 and adopted by the voters of Texas in 1966. (The amendment, as it was passed by the Texas Legislature in 1965 as H.J.R. 79, is reproduced herein as Appendix B.) The amendment does not contain a severability clause. Without the inclusion of a severability clause no provision of the enactment can be declared invalid without invalidating Art. VIII, sec. 1-d in its entirety.

The net effect of the holding sought by Appellant would be to invalidate the only provision under Texas law entitling him or any other taxpayer to assert the right to ad valorem tax assessments based upon the agricultural use value of his lands. Art. VIII, sec. 1-d was a self enacting constitutional amendment; no enabling statute was necessary, nor was any enacted by the Texas Legislature. Surely Appellant does not wish to destroy the very constitutional provision on which he relies in his campaign to lower his annual ad valorem tax bill. But that would be the exact result if Appellant were successful in asserting this appeal. Such a result would be a great injustice to Appellant, Appellee, every taxing jurisdiction in the State of Texas, and every taxpayer in the State of Texas.

CONCLUSION

The Supreme Court of the United States should dismiss Appellant's appeal from the judgment of the Supreme Court of Texas, or in the alternative, affirm the judgment of the Supreme Court of Texas, for the reason that the identical question presented by Appellant in his appeal has previously been decided adversely to the position of Appellant by the Supreme Court of the United States in the case of *Stein v. Lewisville Independent School District*, supra.

Appellant's appeal should be dismissed, or the judgment of the Supreme Court of Texas affirmed, for the further reason that Appellant's appeal does not come within the appellate jurisdiction of the Supreme Court of the United States under 28 U.S.C.A. Sec. 1257 (2), in that there was no question present in the State court of the validity of TEX. CONST. art. VIII, sec. 1-d, on the grounds of its being repugnant to the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Texas did not determine the validity of Art. VIII, sec. 1-d; this case was merely one of construction of a State constitutional enactment, a question of a State law and not of Federal law.

Appellant's appeal should be dismissed or the judgment of the Supreme Court of Texas affirmed for the further reason that the decision of the Supreme Court of Texas was based upon a determination of a question of Texas law wholly independent and apart from any determination of a question of Federal law, the grounds for such decision being a holding that Appellant failed to discharge his burden of proof so as to entitle him to ad valorem tax assessments based upon the agricultural use value of his lands.

Finally, the end result of Appellant's position, were he to prevail, would be to totally and completely invalidate the very provision of the Constitution of the State of Texas upon which Appellant relies in his claim for reduced ad valorem tax assessments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the.....day of.....,
1976, a copy of the foregoing Motion to Dismiss or Affirm was served upon counsel for Appellant, Mr. Billy H. Gragg, P. O. Box 678, Palestine, Texas 75801, by mailing same through the United States Mail, postage prepaid.

Eugene J. Dozier

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. B-5444

O. L. GRAGG, *Petitioner*

v.

CAYUGA INDEPENDENT SCHOOL DISTRICT, *Respondent*

From Anderson County
Twelfth District

CONCURRING OPINION

The Court here writes upon the meaning of the words which require that the agricultural use — of the land being valued for taxation — be "a business venture for profit, which business is the primary occupation and source of income of the owner." I differ with the opinion in two respects: its holding that *gross* income is the basis of comparison of the landowner's occupations, and its holding that each non-agricultural business is to be compared separately with the landowner's total agricultural business.

The agricultural land assessment provision of the Texas Constitution was originally designed in 1965 by the Legislature to permit the lands of farmers and ranchers to be assessed for ad valorem taxation by ignoring true market value and by valuing it as if agriculture were the highest and best use to which

the land may be put. See King v. Real, 466 S.W.2d 1 (Tex. Civ. App. 1971, writ ref'd n.r.e.). The objectives of that basis of valuation of farm and ranch lands are easily understood and justified. Since 1967 when the taxing officers and boards and the landowners began to apply this Section 1-d, Article 8, of the Constitution, they have faced the problems and restrictions of this requirement that the agricultural use be "a business venture for profit, which business is the primary occupation and source of income of the owner." The Legislature attempted to remove this requirement from the Constitution in 1970,[1] but the proposed change was not adopted in the popular vote.

Before addressing the critical questions of the meaning of "primary . . . source of income" presented in the present case, I must first avow a basic precept: the judicial function is to construe the Constitution and not to rewrite it. The Court is confined to the words and composition of the Constitution as they are — not as we prefer them to be. The task of construing constitutional expressions must first be directed toward deciding — by the consideration of the total language as well as the context of circumstances that aid us in understanding the objectives of that language — an overall rationale of plan and purpose for the constitutional provision. I have several diffi-

[1]S.J.R. 15 of the 61st Legislature would have reduced Section 1-d, Article 8, to the following language:

> "The Legislature shall have the power to provide by law for the establishment of a uniform method of assessment of ranch, farm and forest lands, which shall be based upon the capability of such lands to support the raising of livestock and/or to produce farm and forest crops rather than upon the value of such lands and the crop growing thereon." Acts 61st Leg., R.S. 1970, pg. 3227.

culties with the majority opinion. While it tries to simplify the administration of agricultural land assessment, it actually adds complexity and new puzzles. It seems motivated by the desire to enlarge the number of farmers and ranchers who will be entitled to the agricultural use designation of their land, but this may not be the result — since the predicted effect of basing the determination on gross income seems to me to be no more than the Court's own estimate rather than a product of any evidence of the circumstances of most farmers and ranchers. I should think that the effect of the holding that compares all agricultural income to each separate non-agricultural business will be enjoyed by relatively few landowners. Few of them have so many extra businesses as to profit by this ranking procedure, and those who do operate on a multi-business scale are given the means to acquire an agricultural use designation beyond the intent of the constitutional language. It seems to me that the fundamental flaw of the majority is its failure to base these specific interpretations upon an overall rationale of the constitutional provision and its purpose. I will begin by locating that base as I see it.

The special treatment of Section 1-d was not granted to land investors who might plant a crop or put some livestock on their land. It was not even granted to bona fide ranchers or farmers. Anyone whose ranching operations cover over 22,000 acres of land, and who expends on that operation the time and effort that O. L. Gragg does, is certainly a bona fide rancher. But the Constitution requires more: the

agricultural operation must be the *primary* business — as judged both by commitment of effort and receipt of income.

The taxpayer/landowner's occupations and sources of income to be measured are only those which are business ventures, i.e. occupational endeavors to obtain earnings. The taxpayer/landowner's agricultural business must be *the business* which is "the primary occupation and source of income of the owner" — as compared to his non-agricultural business or trade or professional occupation and as measured by the income to him produced by these occupations. The agricultural use designation is to be given only to those whose primary occupation is agricultural rather than non-agricultural. Not only time and activity is to be weighed but also income. The inquiry as to income is but part of the test of the priority of the landowner's occupation. Which occupation is the most important source of his income — agricultural or otherwise? The landowner is not *primarily* a farmer if he operates a dozen businesses and the ten percent of his time and income allocated and collected from his farm exceeds that allocated to and collected from each of the other endeavors. Net profit — the income to *the landowner* — is the indicator of the priority of the source rather than, for example, gross income from the sale of cattle or gross income from occasional trading in mineral leases. The tax assessor and board of equalization are not directed to a consideration of the taxpayer's income during any certain period of time — since casualties or unusual factors may affect profits briefly without changing the priority of the

occupation to which the taxpayer/landowner looks for his income.

This is my construction of the constitutional provision. I now turn to my two specific points of dispute with the majority.

Gross or Net Income

The word "income" usually refers to gain or accretion or return. See Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 174 (1926); Humble Oil & Refining Co. v. Calvert, 478 S.W.2d 926 (Tex. 1972); Fullerton v. Central Lincoln People's Utility Dist., 201 P.2d 524 (Ore. 1948); Kennard v. Wiggins, 183 S.W.2d 870 (Mo. 1944); State ex rel. Miller v. State Board of Education, 52 P.2d 141 (Idaho 1935); Stanton v. Zercher, 172 P. 559 (Wash. 1918); In re Niland's Estate, 143 N.W. 170 (Wisc. 1913); Bingham v. Long, 249 Mass. 79, 144 N.E. 77 (1924); Connecticut General Life Ins. Co. v. Eaton, 218 F. 188 (D.C. Conn. 1914); In re Owl Drug Co., 21 F. Supp. 907 (D.C. Nev. 1937); Lyeth v. Hoey, 20 F. Supp. 619 (S.D.N.Y. 1937); In re Phillips' Will, 138 N.J. eq. 96, 46A.2d 796 (Perogative Ct. 1946); Hattiesburg Grocery Co. v. Robertson, 128 Miss. 34, 88 So. 4 (1921); BLACK'S LAW DICTIONARY (4th ed. 1951); Ballantine's Law Dictionary (1969); Oran, Law Dictionary for Non-Lawyers (1975); Webster's Third International Dictionary (1968); and Webster's Seventh New Collegiate Dictionary (1967).

I agree that "income" has in some instances been used to mean the inflow without deduction for ex-

penses. Our question then becomes a determination of the manner of use of the term in Section 1-d, Article 8, of the Texas Constitution. It is not the purpose of this provision to prohibit gain or activity; it is a measurement of priority. Occupations are to be ranked according to their fruits or products or consequences for the person. The *gross* income of an occupation is a midway factor, but it is not the ultimate result of the occupation. Since the purpose of the constitutional provision is to test the priority of the taxpayer/landowner's occupations, gross receipts or revenue is not the index; it is the gain or profit realized by the taxpayer/landowner from those occupations. We are directed by the Constitution to determine the *business* which is the *primary source of income of the owner.* Ranching and oil businesses are expected to have gross as well as net income, but the income of the owner from those businesses is his profit.

If O. L. Gragg were asked the amount of *his income* from his ranch business during 1971, would he be likely to give the total gross sales of livestock, etc., by his ranches ($299,205.84), or would he give the income produced for his benefit ($79,397.67)? Would Farmer Brown, who lost his crop and $50,000 last year, tell you that his income from his farm was $60,000 since the latter figure was the amount of his gross income received from the liquidation of his herd of cattle?

The majority seems to think that the determination of the gross income of a business is a simple matter. However, the gross income of a mercantile business

is ordinarily considered to be the amount of total sales *less the cost of goods sold.* For the sake of simplicity let us assume that a farmer is on the cash basis of accounting; under federal tax regulations his "gross income" requires a computation of his *profits* from the sale of livestock or other items which were purchased by him. 1976 Federal Tax Regulations § 1:61-4. The full sales prices and receipts are not his "gross income"; the cost of the purchased livestock must first be deducted. I suggest that the determination of whether the taxpayer/landowner is primarily engaged in agriculture will not entail nearly so many difficult accounting problems as will the rule announced by the majority which requires a comparison of the gross income of each and every business in which the taxpayer/landowner is occupied. If the business is organized as a corporation, limited partnership or business partnership, there will be questions of how to allocate gross income to the taxpayer/landowner. Will it be possible to reduce the "gross income" by incorporating the business or by taking no money except in the form of wages or dividends?

I can find no rational purpose in requiring a comparison of the sources of gross income. If I understand the writing of the majority at this point, the thought is simply that more farmers and ranchers will be entitled to the agricultural use designation if only gross agricultural income is considered. I do not know that this is true, but if it is, I respectfully request that this reasoning be compared to the time honored rule that the courts will construe constitutional and statu-

tory exemptions strictly. River Oaks Garden Club v. City of Houston, 370 S.W.2d 851 (Tex. 1963); Morris v. Loan Star Chapt. No. 6, Royal Arch Masons, 68 Tex. 698, 5 S.W. 519 (1887). Whether or not the agricultural use designation must be termed an "exemption" from taxation, it is favored treatment and the constitutional amendment should not be liberally construed. See Driscoll Foundation v. Nueces County, 445 S.W.2d 1, 5 (Tex. Civ. App. 1969, writ ref'd n.r.e., 450 S.W.2d 320, 1970).

Meaning of "Primary" Business

The majority is most liberal in allowing the agricultural use designation to the landowner whose agricultural business produces more income than each of his other businesses or occupations — however many the non-agricultural occupations may be and despite the fact that the total nonagricultural income and time requirements may greatly exceed those of the agricultural business. Our first step in this analysis is to decide whether we must lump the agricultural operations together. Why not permit the tax assessor to rank each farm or ranch separately? O. L. Gragg, for example, operates several different ranches. Suppose the taxpayer and his wife operate a field where they grow vegetables, while he and his son have a large cotton farm, he and another son have some chicken houses, and he and a brother operate a large West Texas ranch. Are these separate businesses under the Constitution? I think not. The Constitution provides:

> "Agricultural use" means the raising of livestock or growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, *which business is* . . .

Any and all "agricultural use" is the one business that must be the taxpayer/landowner's primary occupation.

The next step: "primary." There is no problem as to the meaning of the word. The question is primary *as to what?* I conclude that the objective, as indicated by putting agricultural uses together, is to determine whether agriculture is the primary occupation — as compared to non-agriculture. What would be the purpose of requiring that the farm be more significant than each of a dozen other ventures? This requirement of the Constitution is obviously restrictive. It was no casual bit of drafting; it was intended to prevent the owners of some farms and ranches from obtaining this advantageous assessment of their lands. The comparison that counts—the restriction that ensures that those who obtain the agricultural use designation truly deserve it—is the requirement that the taxpayer/landowner be primarily in the business of agriculture, whatever else (combined) he may do as an occupation.

If the rule of the majority is to apply, how shall we divide the non-agricultural occupations for purposes of comparison? Do oil and gas operations go together, or is Gragg Drilling Company one entity and Carter-Gragg Oil Company another, etc.? At some point the

courts will have to write the rules for arranging these non-agricultural incomes. This could be avoided by following what seems to me to be the plain intent of the Constitution itself. The majority seems to be looking in the direction of that plain intent when it says that the denial of Gragg's agricultural use designation was justified and cites the evidence that his gross agricultural income during the three calendar years of 1970, 1971 and 1972 (together) was approximately $1 million as compared to $1.5 million income from all other sources. I agree that this proof gets to the heart of the case and requires the affirmance of the judgments of the lower courts. The non-agricultural income was all profit or gain, and the gain to Gragg from the agricultural business was necessarily much less than the $1 million (actually about $320,000).

The argument for separation of the non-agricultural income would seem to be that the Constitution points to each "source of income" and this requires that the taxpayer/landowner receive greater income from agriculture than from any other individual *source*. Gragg Drilling Company and Carter-Gragg Oil Company are two different sources of income, and their income would then be considered separately rather than added together. Gragg owns several different oil properties, and it seems that the production from each of these should be considered as income from a separate source. I conclude that whereas O. L. Gragg may have failed to make the proof required to obtain 1970, 1971 or 1972 agricultural use designations, the record and briefs in this case indicate that

he may come within the new rules and be able to make the proof to qualify in future years.

Thomas M. Reavley
Associate Justice

Associate Justices McGee and Johnson join in this Concurring Opinion.

OPINION DELIVERED: June 16, 1976.

APPENDIX B

Proposed Constitutional Amendment — Agricultural Lands — Taxation

H. J. R. No. 79

Proposing an amendment to Article VIII, Constitution of the State of Texas, by adding Section 1-d to provide that all land owned by natural persons designated for agricultural use shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use.

Be it resolved by the Legislature of the State of Texas:

Section 1. That Article VIII, Constitution of the State of Texas, be amended by adding Section 1-d to read as follows:

"Section 1-d. (a) All land owned by natural persons which is designated for agricultural use in accordance with the provisions of this Section shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use. 'Agricultural use' means the raising of livestock of growing of crops, fruit, flowers, and other products of the soil under natural conditions as a business venture for profit, which business is the primary occupation and source of income of the owner.

"(b) For each assessment year the owner wishes to qualify his land under provisions of this Section as

designated for agricultural use he shall file with the local tax assesor a sworn statement in writing describing the use to which the land is devoted.

"(c) Upon receipt of the sworn statement in writing the local tax assessor shall determine whether or not such land qualifies for the designation as to agricultural use as defined herein and in the event it so qualifies he shall designate such land as being for agricultural use and assess the land accordingly.

"(d) Such local tax assessor may inspect the land and require such evidence of use and source of income as may be necessary or useful in determining whether or not the agricultural use provision of this article applies.

"(e) No land may qualify for the designation provided for in this Act unless for at least three (3) successive years immediately preceding the assessment date the land has been devoted exclusively for agricultural use, or unless ths land has been continuously developed for agriculture during such time.

"(f) Each year during which the land is designated for agricultural use, the local tax assessor shall note on his records the valuation which would have been made had the land not qualified for such designation under this Section. If designated land is subsequently diverted to a purpose other than that of agricultural use, or is sold, the land shall be subject to an additional tax. The additional tax shall equal the difference between taxes paid or payable, hereunder, and the amount of tax payable for the preceding three years had the land been otherwise assessed. Until paid, there shall be a lien for additional taxes and

interest on land assessed under the provisions of this Section.

"(g) The valuation and assessment of any minerals or subsurface rights to minerals shall not come within the provisions of this Section."

Sec. 2. The foregoing Constitutional Amendment shall be submitted to a vote of the qualified electors of this State at an election to be held on the first Tuesday after the first Monday in November, 1966, at which election all ballots shall have printed on them the following:

"FOR the Constitutional Amendment to provide that all land owned by natural persons designated for agricultural use shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use.

"AGAINST the Constitutional Amendment to provide that all land owned by natural persons designated for agricultural use shall be assessed for all tax purposes on the consideration of only those factors relative to such agricultural use."

Sec. 3. The Governor of the State of Texas shall issue the necessary proclamation for the election and this Amendment shall be published in the manner and for the length of time as required by the constitution and laws of this state.

Adopted by the House on April 27, 1965: Yeas 102, Nays 32; passed by the Senate on May 10, 1965: Yeas 21, Nays 9.

Signed by the Governor May 21, 1965.